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**Industria Lechera De Puerto Rico, Inc. (Indulac, Inc.)
and Congreso De Uniones Industriales De
Puerto Rico. Case 24–CA–9591**

June 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On February 18, 2004, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order as modified and set forth in full below.¹

In adopting the judge's decision finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally transferring employee Jose del Valle from the second shift to the first shift, we also rely on *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). The Supreme Court's *Barnett* decision undercuts the Respondent's argument that it was privileged to act unilaterally because it was required to provide del Valle a "reasonable accommodation" under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. In *Barnett*, the Supreme Court concluded that, absent special circumstances, the ADA does not require an employer to assign a disabled employee to a particular position when the assignment would violate the employer's "established seniority system." 535 U.S. at 406. Here, the Respondent transferred del Valle to the first shift—the shift most desired by the Respondent's employees—after receiving a letter from del Valle's physician stating that del Valle should be transferred to that shift because he was taking medication at night that might cause him to endanger his coworkers. Without notifying the Union or providing it an opportunity to bargain, the Respondent implemented the transfer, even though it maintained a seniority system governing shift assignments, and there was another second shift employee who was more senior than del Valle. Particularly in light of *Barnett*, we find no merit in the

¹ We have modified the judge's recommended Order and notice to employees to correspond to the violation found and to more closely conform to the standard language for our remedial provisions. See *Mimbres Memorial Hospital*, 337 NLRB 998, 999 (2002), enf'd. 108 Fed. Appx. 577 (10th Cir. 2004).

Respondent's argument that its unilateral transfer of del Valle was required under the ADA.²

The Court's finding that the ADA does not require unilateral abrogation of seniority systems, absent special circumstances, is fatal to the Respondent's use of the ADA as a defense here. In *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 144 (2002), the Court stated that "where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield." Consistent with the principles stated in the Court's decision in *Barnett*, no such trenching is occasioned by the enforcement of the National Labor Relations Act (NLRA) here to prohibit the Respondent from unilaterally contravening its seniority system. In *Hoffman*, the Court was concerned that the employer's compliance with the Board's order would require the employer to violate another Federal statute—the Immigration Reform and Control Act. Unlike the employer in *Hoffman*, however, the Respondent's compliance with the Board's Order will not require it to violate the ADA. See generally *Watsonville Register-Pajaronian*, 327 NLRB 957, 958–959 (1999).³ The NLRA requires only that the Respondent bargain with the Union before making the change of the seniority system to accommodate del Valle. After bargaining to a good-faith impasse or agreement on the change, the Respondent is free to make the change.⁴ Concededly, under the Board's Order, the Respondent must restore the status quo ante, pending such bargaining. However, as discussed, such compliance will not result in a violation of the ADA.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as

² Further, in adopting the judge's finding that the Respondent's unilateral transfer of del Valle was unlawful, we do not rely on the judge's suggestion that, instead of transferring to the first shift, del Valle could have taken his medication during the day and continued to work on the second shift.

In the absence of exceptions, we adopt the judge's finding that the Respondent did not violate Sec. 8(a)(5) and (1) by refusing to provide the Union with medical documentation concerning del Valle's disability.

³ Member Schaumber finds it unnecessary to rely on the citation to *Watsonville Register-Pajaronian*, 327 NLRB 957 (1999).

⁴ Member Schaumber agrees with the judge that the Respondent violated Sec. 8(a)(5) by transferring del Valle from the night shift without providing the Union with notice and an opportunity to bargain. He does not reach the question whether, having provided the requisite notice and opportunity to bargain, the Respondent would have additionally been required to negotiate to impasse or agreement before making the change. Further, Member Schaumber observes that the Respondent appears to have believed in good faith that it was acting responsibly in making the unilateral change, although such good faith is not a defense under the circumstances of this case.

modified and set forth in full below, and orders that the Respondent, Industria Lechera de Puerto Rico, Inc. (Indulac, Inc.), Hato Rey, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally transferring employees from one shift to another without giving notice to and an opportunity to bargain over such transfers to the Congreso de Uniones Industriales de Puerto Rico (the Union).

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All production and maintenance employees employed by the Respondent at its plant in Hato Rey, Puerto Rico, including chauffeurs and chauffeur helpers; excluding office clerical employees, administrative and executive employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Hato Rey, Puerto Rico, copies of the attached notice, both in English and Spanish, marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 2003.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

testing to the steps the Respondent has taken to comply with this Order.

Dated, Washington, D.C. June 30, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally transfer employees from one shift to another without giving notice and an opportunity to bargain over such transfers to the Congreso de Uniones Industriales de Puerto Rico (the Union).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

All production and maintenance employees employed by the Respondent at its plant in Hato Rey, Puerto Rico, including chauffeurs and chauffeur helpers; excluding office clerical employees, administrative and executive employees, guards and supervisors as defined in the Act.

INDUSTRIA LECHERA DE PUERTO RICO, INC.
(INDULAC, INC.)

Venesa Garcia, Esq., for the Government.¹
Fernando A. Baerga Ibanez, Esq., for the Company.²
Jose Alberto Figueroa, President, for the Union.³

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. The Government alleges the Company, since on or about March 4, 2003, has failed and refused to bargain in good faith with the Union as the admittedly exclusive collective-bargaining representative for a unit (Unit) of its production and maintenance employees, chauffeurs, and chauffeur helpers.⁴

Allegations

Specifically, the Government alleges the Company, on or about March 4, 2003, unilaterally transferred its unit employee Jose del Valle from the night to day shift without prior notice to the Union and without affording the Union an opportunity to bargain with it with respect thereto or the effects thereof on the bargaining unit. The Government alleges the transfer relates to terms and conditions of employment for bargaining unit employees and is a mandatory bargaining subject. The Government also alleges that on or about March 4, 2003, the Union requested the Company furnish it with information regarding the transfer. It is alleged the information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees and that the Company has failed and refused to provide the information. It is alleged the above actions of the Company violate Section 8(a)(5) and (1) of the National Labor Relations Act (Act).

The Company admits that the Board's jurisdiction is properly invoked⁵ and that the Union⁶ is a labor organization within the meaning of the Act. The Company, however, denies having violated the Act in any manner alleged in the complaint. The Company states bargaining unit employee Jose del Valle requested a reasonable accommodation within the meaning of the Americans with Disabilities Act of 1990. In doing so, Jose del Valle's doctor requested he be transferred from the night to the day shift. The Company asserts it had no position on the day shift for Jose del Valle at the time of his request. The Company asserts it created a position on the first shift to accommodate Jose del Valle and as such did not transfer him to any then ex-

isting unit position on that shift. According to the Company, positions on work shifts have traditionally been determined by seniority.

The Company asserts it could not, and did not, provide the Union with the information requested regarding its decision to grant Jose del Valle a transfer because its decision was based solely on Jose del Valle's doctor's written (1 page) medical report. The Company asserts the Americans with Disabilities Act forbids the release of information regarding the actual illness of an individual seeking accommodation or any medication prescribed for the individual. The Company asserts it offered to provide the requested 1 page medical document to the Union if the Union obtained a release from Jose del Valle.⁷

I have studied the whole record, the briefs filed by the Government and the Company, and the authorities they rely on. Based on more detailed findings and analysis below, I conclude and find the Company violated the Act by unilaterally transferring its employee Jose del Valle from the night to day shift without prior notice to the Union and without affording the Union an opportunity to bargain with respect thereto and the effects of this conduct. I find the Company did not violate the Act when it refused, in the manner it did, to provide the Union with the information regarding Jose del Valle's transfer from the night to day shift.

FINDINGS OF FACT⁸

1. OVERVIEW

The Company processes surplus "over produced" milk, butter, and cheese which it then sells. The business is somewhat seasonal. The Company, at seasonal times, employs approximately 90 unit employees on three fixed shifts. The first shift is from 6 a.m. until 3 p.m.; the second shift from 3 p.m. until midnight and the third shift from 9 p.m. until 6 a.m. Employees prefer the first shift. Pertinent to this case the Company employs production and maintenance employees serving as machine operators such as Jose del Valle.

The Union has been the certified exclusive collective-bargaining representative for the unit employees since July 3, 2002. The Union and Company are negotiating toward an initial collective-bargaining agreement. The Unit employees were represented in the past by Seafarers International Union. The Company's and Seafarers International Union's most recent collective-bargaining agreement for the Unit employees expired in May 2003. Jose del Valle was a Unit Union shop steward for the Seafarers International Union.

The parties stipulated the Company transferred its employee, Jose del Valle, from the night to day shift, on March 4, 2003, and further stipulated the Company's past practice regarding work shift assignments has been, and continues to be,

¹ I shall refer to counsel for General Counsel as the Government

² I shall refer to the Respondent as the Company.

³ I shall refer to the Charging party as the Union.

⁴ This trial was held in San Juan, Puerto Rico, on December 10, 2003, based upon a charge and amended charge filed by the Union on May 12 and July 31, 2003, respectively. The Government issued the complaint and Notice of Hearing on August 29, 2003.

⁵ The Company admits that annually it purchases and receives at its Hato Rey, Puerto Rico location, goods and materials valued in excess of \$50,000 directly from points located outside the Commonwealth of Puerto Rico. The Company admits, the evidence establishes, and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

⁶ I find the Union is a labor organization within the meaning of Section 2(5) or the Act.

⁷ The Company provided the Government, pursuant to subpoena, a copy of the actual 1 page medical document in question with references to the illness and medication redacted therefrom.

⁸ The essential facts are not significantly disputed. Unless I note otherwise, my findings are based on admitted or stipulated facts, documentary exhibits, or undisputed and credible testimony. Specific reference has from time to time been made to the particular witness providing certain facts.

dependent on employees' plant seniority. The parties also stipulated that at the time of Jose del Valle's transfer there was a unit employee on the night shift more senior than he. It is acknowledged Jose del Valle only worked on the first shift position he was transferred to until June 2003. Additional positions were reopened on the first shift in June 2003 to process cheese. Jose del Valle bid for and was awarded, by seniority, one of the reopened positions.

Jose Alberto Figueroa is President of the Union, unit employees Juan Hernandez and Jines Arias are union shop stewards and Pedro Trinidad is Company Operations Director.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Further Facts

As outlined above and more fully set forth here, unit employee Jose del Valle requested on or about February 26, 2003, a reasonable accommodation from the Company because of health concerns. Jose del Valle provided the Company a medical document signed by Psychiatrist Doctor Emma Negron, M.D. dated February 26, 2003, in which it was recommended he be reassigned from the night to day shift in that he was on controlled medication at night that could affect his performance.

Company Operations Director Trinidad reviewed Jose del Valle's medical document checking the "letterhead" "address and telephone number" and ensuring a physician had signed it. Trinidad explained management officials were not doctors, and in cases with medical recommendations, did not try to second-guess or question a doctor's recommendations.

Company Operations Director Trinidad testified he accommodated Jose del Valle because del Valle's physician stated he was "under medication at night and this could constitute a danger for other employees." Trinidad explained it was his "obligation as employer to immediately transfer ... [Jose del Valle] ... to another position with lesser danger presented to his co-workers." Trinidad also explained no vacancy existed on the first shift as of March 3, 2003, so he created a position on that shift to accommodate Jose del Valle. In creating the new first shift position Trinidad pointed out that "no employee on first shift was displaced." Trinidad acknowledged there was one employee on second shift that had "a couple of days more" seniority than Jose del Valle.

Pursuant to the request for accommodation and management's creating a position on first shift, Jose del Valle commenced working that shift on March 4, 2003.

Union President Figueroa had a previously arranged meeting with the Company for March 4, 2003, "in order to discuss a series of cases that were pending" at that time between the parties. The meeting took place on that date with Figueroa, and seven union stewards and/or unit employees meeting with Company Operations Director Trinidad. Figueroa told Trinidad a claim had been made on behalf of the second shift employees regarding Jose del Valle's transfer from the second to first shift. Second shift union steward Jines Arias asked Trinidad for an explanation of the transfer. Arias wanted to know if the reasons for the transfer were "really valid" because the transfer was affecting seniority rights regarding second shift employees

seeking to work first shift. Union President Figueroa cautioned Arias that he was "presenting serious accusations" that "could bring forth problems." Arias said he only needed some answers from the Company so he could explain to the unit employees why Jose del Valle was transferred to first shift and he assured everyone he was not accusing anyone of anything at that time.

Trinidad testified Arias told him "it was his understanding that [Jose del Valle] was not sick that he had nothing." Trinidad said he told Arias "these are your comments." Trinidad said he explained to Arias that Jose del Valle had "requested a reasonable accommodation according to the ADA and he had medical records" to support his request. Trinidad said Arias "insisted on seeing the documents and the evidence, the proof." Trinidad testified he suggested to Arias that if he wanted to see the medical document he should negotiate with the employees, go to Jose del Valle and "allow the employee to authorize him to look at these documents." According to Trinidad the portion of the meeting dealing with Jose del Valle ended shortly thereafter and he never heard about the transfer until the underlying charge herein was filed.

Union President Figueroa testified that at the time he requested a copy of Jose del Valle's medical document Trinidad told him he needed to get legal counsel regarding whether he could provide the document and would get back with Figueroa. Figueroa explained the Union needed the medical document "to corroborate or verify if indeed the medical certificate was to validate the change from second shift to first shift." Figueroa specifically denied Trinidad told him or the Union they needed to get a waiver from Jose del Valle to obtain the requested medical document. Employee Juan Hernandez testified Trinidad declined to give them the requested document because he needed "to get advice from his attorneys" and that "he would ... get back with us," and added "nothing else" was said.

The document sought by the Union and not provided by the Company was provided (in redacted form) to the Government pursuant to a subpoena. The *redacted* medical document was received in evidence and follows:

Instituto Panamericano
Manati, Puerto Rico

February 26, 2003

TO WHOM IT MAY CONCERN:

By the present we are certifying that Jose Del Valle-Colon, was/is under treatment at the Instituto Panamericano de Manati.

February 14, 2003 to February 26, 2002 and was hospitalized in Cidra from February 11, 2003 to February 14, 2003. A change in shift is recommended, during the day since he is on controlled medication at night that could affect his performance.

For any additional information, please call us at 854-0001 - 854-1471.

Very truly yours, (_____ at
night _____,
[Signed] _____ at night,
Emma Negron, MD 111539 at night _____.)

Psychiatrist

*The patient will continue ambulatory treatment and can return to work March 3, 2003.

Carretera 2 Km. 46.1 Bo. Campo Alegre, Manati, P.R. 00674
(787) 854-0001 Fax: (787) 854-0030

Union President Figueroa testified he also requested the medical document in a letter directed to Company Operations Director Trinidad dated March 20, 2003. Figueroa testified he also requested in his letter that the parties meet to discuss Jose del Valle's transfer. Figueroa asserts the letter was sent by mail and facsimile on March 20, 2003. Figueroa testified the Company has never at any time provided the document nor did the Company notify the Union, prior to Jose del Valle's transfer, that he was being transferred.

Company Operations Director Trinidad testified he had not seen, nor was he aware of, the Union's March 20, 2003 letter until the trial herein. Trinidad testified specifically that no request for information was made by the Union after the March 4, 2003 meeting. Trinidad explained he did not notify the Union prior to creating the position on first shift:

because the rights of the employees in issue were not affected, because that was a special situation a temporary situation, in which I wanted to follow his physician's recommendations and above all, protect the safety and integrity of the rest of the employees.

Based upon testimonial demeanor, I credit the testimony of Trinidad, over that of Figueroa and Hernandez, regarding their meeting on March 4, 2003, pertaining to the transfer of Jose del Valle. I specifically credit Trinidad's testimony that he suggested to the Union they might obtain a waiver from Jose del Valle in order to obtain the medical documents. I am not persuaded the Government established the Union sent the Company the letter requesting information and bargaining on March 20, 2003, that the Union asserts was sent. First, Trinidad denied receiving the letter. Second, the Government provided no proof of service by mail nor any independent verification of the letter being sent by facsimile. I note also Figueroa acknowledged he did not see nor sign, but authorized, the letter to be signed on his behalf. The individual at the union who assertedly prepared, addressed, signed, and *deposited* the letter with the postal service and/or *sent* the letter by facsimile was not called to testify by the Government or Union. Under these circumstances, I find the failure to produce *any* direct evidence the letter was actually sent by any means calls into question the existence of the letter at the time the letter is asserted to have been authorized, created, and *sent*.

B. Positions of the Parties Unilateral Changes

Government counsel notes it is not disputed that the Company created a first shift position and transferred Jose del Valle to it, on or about March 4, 2003, without notification to or bargaining with the Union. Government counsel contends transferring an employee from one shift to another relates to terms and working conditions of unit employees and as such is a mandatory subject for bargaining. Government counsel asserts the

Board has consistently found work schedules and hours to be worked are mandatory bargaining subjects. Government counsel notes the Company's past practice regarding work shift assignments has been, and continues to be, dependent on the unit employees' seniority. Government counsel asserts, and correctly so, that as of March 4, 2003, there was an employee on second shift more senior than Jose del Valle. Government counsel argues the Company had a statutory, as well as past practice obligation, to bargain over the schedule change before implementing it.

Anticipating some of the Company's defenses, Government counsel disputes any claim the unilateral schedule change herein for Jose del Valle was de minimus and did not rise to the level of a violation of the Act. Government counsel argues the Board consistently finds unilateral changes in employees' work starting times and job assignments affecting seniority rights to be material, substantial, and significant changes. Government counsel asserts an employer, such as the Company herein, that effects unilateral changes in terms and conditions that are mandatory subjects of bargaining commits a per se violation of Section 8(a)(5) of the Act.

The Company concedes it created a new position on first shift for a machine operator in early March 2003. It acknowledges it transferred Jose del Valle from second to first shift to fill the newly created position without notification to or bargaining with the Union. The Company acknowledges that when a labor organization has been recognized or certified as the bargaining representative of an employer's employees Section 8(a)(5) of the Act obligates the employer to bargain collectively over wages, hours, and other terms and conditions of employment. The Company also acknowledges an employer violates that duty if it changes working conditions of represented employees without first giving the union notice of the proposed changes and affording the union an opportunity to bargain.

The Company, however, argues it did not have an obligation to notify and bargain with the Union about the terms of the change in shift herein because the change in shift did not constitute a change in working conditions of the unit employees. The Company contends it created a new first shift operator position to afford Jose del Valle an accommodation pursuant to his request under the provisions of the Americans with Disabilities Act of 1990, Section 2 et seq., 42 U.S.C.A. Section 12101 et seq. The Company argues that once it had an employee with a qualified disability who had requested a reasonable accommodation it was required to utilize an interactive process to identify and propose solutions. Stated differently the Company contends that if an employee, such as Jose del Valle, has a disability, but is qualified and can perform the essential functions of the job, then the employer must reasonably accommodate the individual's known disability unless the employer proves such an accommodation would entail an "undue hardship." The Company asserts it did not contest the initial petition for relief of Jose del Valle but rather attempted to afford him a reasonable accommodation. The Company contends there was no change in the terms and conditions of employment of unit employees. The Company asserts there is no showing that the creation of the new first shift position affected the only employee that had more seniority than Jose del Valle. The Com-

pany notes no employees on the first shift were displaced in order to accommodate Jose del Valle. The Company argues none of the employees of the second shift would have been transferred to the first shift at the time in question, since there were no vacancies on the first shift nor any need for additional employees on that shift. The Company notes no one from management received any claims from any employees that their rights, seniority, or otherwise, had been violated. The Company argues there can be no violation of the Act because the shift change for Jose del Valle was not a material, substantial, and/or significant change in the terms and conditions of employment of the unit employees. Additionally the Company argues, if any violation of the Act should be found it could only be a de minimus violation and should be dismissed on that basis.

C. Analytical Framework Unilateral Change

General speaking when a union has been certified (or recognized) as the exclusive collective-bargaining representative of employees in an appropriate unit an employer is obligated, upon request, to bargain collectively over wages, hours, and other terms and conditions of employment. The subjects over which an employer is required to bargain constitutes and are referred to as "mandatory" subjects of bargaining. Mandatory subjects of bargaining, generally described, are those that regulate the labor relations between an employer and its employees. Employers may not make unilateral changes in mandatory subjects of bargaining unless or until they have satisfied their duty to negotiate. A unilateral change not only violates the requirement to bargain over mandatory subjects, but also does damage to the process of collective bargaining itself. See, *Fresno Bee*, 339 NLRB 1214, 1219 (2003). An employer violates Section 8(a)(5) when it makes a material and substantial change in wages, hours, or other terms or conditions of employment that are mandatory subjects of bargaining and fails to give notice to and/or bargain with the union representing its employees about such changes. To avoid a finding of a violation of the Act an employer must establish that the unilateral change was in some way privileged.

D. Analysis and Conclusions Unilateral Change

It is undisputed the Company transferred unit employee Jose del Valle from the night to day shift on March 4, 2003. It is likewise undisputed the Company did not provide the Union with notice or an opportunity to bargain concerning this conduct and the effects of this conduct on the Unit. The parties stipulated that the Company's "past practice regarding work shift assignments has been, and continues to be, dependent on employees' seniority at the plant." It is stipulated there was an employee on the night shift, at the time of the transfer of Jose del Valle from the night to day shift, that was senior to Jose del Valle. The transfer of a unit employee from one shift to another is a mandatory subject for bargaining. *Illiana Transit Warehouse Corp.*, 323 NLRB 111 (1997) and *Fresno Bee*, 339 NLRB 1214 (2003). In agreement with Government Counsel, an employer, such as the Company herein, that effects unilateral changes in terms and conditions of employment that are mandatory subjects of bargaining commits a prima facie violation of the Act.

The Company's defenses must be examined to ascertain if its unilateral change was in some way privileged. The Company has the burden to demonstrate such, if in fact it can do so. The Company contends its accommodation of Jose de Valle did not violate the Act in any way. The Company contends that in accommodating Jose del Valle it "created" a position on the first shift even though a vacancy did not exist nor was any additional help needed on that shift. The Company notes no employee on first shift was displaced in order to accommodate Jose del Valle. The Company asserts Government counsel "did not present any evidence that the creation of the new vacancy affected the only employee that had more seniority than Jose del Valle." The Company argues there was no change to the terms and conditions of employment of the unit employees; therefore, no violation of the Act.

Some discussion of the Americans with Disabilities Act is perhaps helpful in considering the Company's defense. First, I am not unmindful of the stated purpose of Congress when it enacted the Americans with Disabilities Act which was to provide a national mandate for the elimination of discrimination against individuals with disabilities. Was Jose del Valle a qualified individual with a disability and did the Company violate the Act when it, in the manner it did, accommodated his disability? To evaluate the Company's defense I find it unnecessary to set forth an exhaustive review of the Americans with Disabilities Act. Suffice it to say a qualified individual is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position the individual holds or desires. If an employee cannot perform the essential functions of his/her original job but could perform the essential functions of another job at the employer the employee is still covered by the Americans with Disabilities Act. If an employee has a qualified disability and requests a reasonable accommodation, an employer is required to identify and propose solutions. An employer is not, however, required to provide a specific accommodation to a qualified disabled employee but rather an employer has significant discretion in determining what constitutes a reasonable accommodation within the meaning of the Americans with Disabilities Act. An employer need not make an accommodation at all if doing so would impose an undue hardship on the operation of the employer's business.

The Company herein assumed Jose del Valle was a qualified individual with a disability under the Americans with Disabilities Act relying, as it did, on the medical document he presented that indicated he was "on controlled medication at night that could affect his performance." For the purposes of evaluating the Company's defense herein I need not determine if being place on medication for a limited period of time that might affect an employee's performance constitutes a recognizable disability. I will assume, without deciding, that it does. There is no question but that Jose del Valle could perform the essential functions of the additionally created first shift operator position the Company transferred him to. Notwithstanding Jose del Valle's established disability, I am persuaded the Company may not avoid its bargaining obligations, pertaining to creating a new unit position on first shift, and transferring Jose del Valle to it, simply by asserting it was accommodating an employee

with a disability. I so conclude because work shift assignments, schedules, and hours of work are mandatory subjects of bargaining. Work shift assignments at the Company have always been and continue to be made by seniority. The accommodation the Company made infringed on the seniority rights of other unit employees and as such was unreasonable even pursuant to the Americans with Disabilities Act. *Kralik v. Durbin*, 130 F.3d 76, 83 (3rd Cir. 1997). The Company's argument that no employee rights were violated in the transfer of Jose del Valle because no employee was displaced on first shift nor would any employee have been transferred from second to the first shift if it had not created a new unit position on first shift to accommodate Jose del Valle is invalid and misses a very crucial point. What the Company did in accommodating Jose del Valle, *in the manner it did*, caused employees' to lose some of the value of their seniority rights. Accordingly I find the Company's attempt to demonstrate its unilateral change was privileged fails.

I next examine the Company's asserted defense that the unilateral transfer of Jose del Valle from second to first shift did not violate the Act because it was not a "material, substantial and significant one." Contrary to the Company's contention I conclude and find the creation of a new unit position on the most desired work shift is a significant change. The change impacted employees on the second shift and specifically the employee senior to Jose del Valle. Additionally, if one employee's seniority is violated it lessens the value of seniority rights for all remaining unit employees. The Company's assertion it had no complaints from the second shift employees affords it no relief. There were complaints to the Union and it was on the basis of those complaints that the matter was raised with management. I reject the Company's contention that the fact none of the employees on the second shift would have been transferred to first shift at the time in question, absent the creation of a new unit position on first to accommodate an employee with a disability, would make the transfer immaterial, unsubstantial, or insignificant. I find the creation of the first shift position and the transfer of Jose del Valle was a material, substantial, and significant change in terms and conditions of employment of unit employees.

Finally the Company's question "what could it have done differently than it did when it was faced with an urgent disability accommodation request" is answered, namely, give notice to and bargain with the Union about it. Perhaps Jose del Valle could have taken his medication during the day and worked the night shift without affecting his performance on that shift.

I find the Company failed to demonstrate it was privileged to implement the unilateral transfer outlined above. I specifically find the Company violated Section 8(a)(5) and (1) of the Act when on or about March 4, 2003, it unilaterally and without prior notice to or bargaining with the Union, transferred its unit employees Jose del Valle from second to first shift.

E. Information Request

Jose del Valle's transfer on March 4, 2003, from second (night) to first (day) shift was based solely on the 1 page medical document he provided to the Company seeking an accommodation. The Company and Union met on March 4, 2003, to discuss various concerns including the transfer of Jose del

Valle. At that meeting the Union, through Union Steward Arias and Union President Figueroa, asked to be provided Jose del Valle's 1 page medical document. The Union explained the document was needed to see if the transfer was "really valid" because, it was affecting second shift unit employees' seniority rights. The Union insisted it see the document as it alone constituted the "evidence" and/or the "proof" that the transfer was valid. The credited evidence establishes Company Operations Director Trinidad was concerned about the confidential nature of the medical information on the document. Trinidad also believed the Americans with Disabilities Act prohibited the release of the information. Trinidad suggested to Union Steward Arias and Union President Figueroa that if the Union wanted to see the medical document they should negotiate with the employees and seek Jose del Valle's authorization to look at the document.

The Union claims it raised its request for information a second time with the Company in a letter dated March 20, 2003. I concluded, as explained earlier, that I am unwilling to find the letter was actually *sent* as contended by the Union. Accordingly, I find the Union did not raise the issue again with the Company until it filed the underlying charge herein.

F. Analytical Framework For Information Request

It is well-settled, if a union requests, an employer has an obligation to provide information the union needs to fulfill its obligation to represent the unit employees and to bargain on their behalf. Stated differently, an employer has a statutory obligation to provide requested information in its possession that is relevant, or even potentially or probably relevant to a union in fulfilling its responsibilities as the employees' exclusive bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Information concerning terms and conditions of employment is presumably relevant and must be provided within a reasonable time, or, if not provided, a timely explanation must be given. *FMC Corp.*, 290 NLRB 483, 489 (1988). A union's interest in relevant and necessary information; however, does not always predominate over other legitimate interests. The Supreme Court in *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 99 S. Ct. 1123 (1979), explained "a union's bare assertion that it needs information to process a grievance [or potential grievance] does not automatically oblige the employer to supply all the information in the manner requested." The duty to supply information turns upon the circumstances of the particular case, and much the same may be said for the type of disclosure that will satisfy that duty. In dealing with a union's request for relevant, but assertedly confidential information possessed by an employer, the Court requires the Board to balance a union's need for the information against any legitimate and substantial confidentiality interest established by the employer. The party making a claim of confidentiality has the burden of proving that such interests are in fact present and of such significance as to outweigh the union's need for the information. *Jacksonville Association For Retarded Citizens*, 316 NLRB 338, 340 (1995). To trigger a balancing test, an employer must first timely raise and prove its confidentiality claim. Additionally, an employer possessing the information and refusing to disclose it on confidential grounds has a

duty to seek an accommodation through the bargaining process. The employer must bargain towards an accommodation between the union's need for the information and the employer's justified confidentiality concerns. *Exxon Co. USA*, 321 NLRB 896, 898 (1996).

G. Positions of the Parties on Requested Information

The Government contends the Company's refusal, on and after March 4, 2003, to supply the Union with Jose del Valle's medical documentation, as requested by Union Steward Arias and Union President Figueroa, constitutes an unlawful refusal to bargain.

The Company asserts it has not refused to bargain but rather has sought to protect confidential information from unauthorized release. The Company further asserts it attempted to arrive at an accommodation with the Union regarding the release of the information.

The Union sought the information to see if it validated the employee's change from second to first shift because the change was affecting seniority rights of second shift employees. I find the Union's request was relevant and reasonably necessary to its representative duty to investigate contractual and past practice seniority rights and to, if necessary, prosecute (potential) grievances.

I find the Company alerted the Union of and established its confidentiality concerns. The Company expressed its confidentiality concerns to the Union when Company Operations Director Trinidad advised the Union that Jose del Valle had requested a reasonable accommodation pursuant to the Americans with Disabilities Act and had supported his request with the medical document in question. Company Operations Director Trinidad suggested to the Union that it negotiate and specifically stated the Union should seek Jose del Valle's authorization for the Company to release the requested information. The Union apparently never acted on the Company's accommodation suggestion nor did the Union seek any other accommodation that might satisfy its need for information while at the same time protecting, to the extent possible, the confidential nature of the requested information. The Board, with specific guidance from the U.S. Equal Employment Opportunity Commission (EEOC), concluded in *Roseburg Forest Products Co.*, 331 NLRB 999, 1003 (2000) that the Americans with Disabilities Act permits an employer to give a union, in its role as bargaining representative, medical information necessary to the Americans with Disabilities Act reasonable accommodation process to enable the employer and union to make reasonable accommodation determinations consistent with the Americans with Disabilities Act. The Board; however, envisioned the *parties* would negotiate to determine what the employer would be "permitted" to provide of medical information while recognizing the confidential nature of medical information. Here the Union failed to respond to the Company's suggestion it seek a release from Jesse del Valle. Further the Union did not attempt in any other way to negotiate concerning the confidentiality claims raised by the Company. The Union did not, for example, come forward with any assurances it would limit access to the information to those on a need to know basis.

I find the Company met its burden of showing it had a legitimate and substantial interest in not releasing the medical document Jose del Valle presented to it in support of his request for accommodation. The Americans with Disabilities Act requires the Company to safe guard such medical information except it may be permitted to provide certain information in order for it and the Union to make reasonable accommodation determinations consistent with the Americans with Disabilities Act. I find the Union failed to follow through with the Company's offer that it seek a waiver from Jose del Valle for the information, or that it proposed or sought any other solution to meet their need for the information. Accordingly, I find the Government has failed to establish that the Company violated the Act by refusing, in the manner it did, to furnish the information the Union requested on March 4, 2003. Accordingly I shall dismiss that complaint allegation.

III. REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Company shall be ordered to bargain in good faith with the Union regarding any requests for accommodations pursuant to the Americans with Disabilities Act that impacts working conditions specifically including work or shift assignments of any unit employees. It does not appear any additional remedy would be appropriate. The newly created first shift position no longer exists. No employee lost money or other benefits as a result of the Company's unilateral transfer of Jose del Valle from second to first shift. No seniority rights need be restored.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Company, Industrial Lechera De Puerto Rico Inc. (Indulac, Inc.), its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Unilaterally transferring employees from one shift to another without prior notice to the Union and without affording the Union an opportunity to bargain with regard to the effects of such changes.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, meet and bargain in good faith with the Union regarding transferring employees from one shift to another in order to accommodate employees pursuant to the Americans with Disabilities Act, in the following unit appropriate for purposes of collective bargaining

⁹ If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

All production and maintenance employees employed by the Company at its plant in Hato Rey, Puerto Rico, including chauffeurs and chauffer helpers; excluding office clerical employees, administrative and executive employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Hato Rey, Puerto Rico, copies of the attached notices, both in English and Spanish, marked "Appendix ." ¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Company's authorized representative, shall be posted by the Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the Notice to Employees employed by the Company at any time since March 4, 2003.

IT IS FURTHER ORDERED that the complaint be, and hereby is, dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, DC February 18, 2004

APPENDIX

NOTICE TO EMPLOYEES POSTED BY THE ORDER OF THE

¹⁰ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally transfer employees from one shift to another without prior notice to the Union and without affording the Union an opportunity to bargain with regard to the effects of these changes.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of your Section 7 rights.

WE WILL, on request, meet and bargain in good faith with the Union regarding transferring employees from one shift to another in order to accommodate employees pursuant to the Americans with Disabilities Act, in the following unit appropriate for purposes of collective bargaining

All production and maintenance employees employed by the Company at its plant in Hato Rey, Puerto Rico, including chauffeurs and chauffeurs helpers; but excluding office clerical employees, administrative and executive employees, guards and supervisors as defined in the Act.

INDUSTRIA LECHERA DE PUERTO RICO INC. (INDULAC, INC.)